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IN THE

Supreme Court of the United States

October Term, 1943

—o—

NO. 409

—o—

TENNESSEE COAL, IRON AND RAILROAD COMPANY, Et al.,

Petitioners,

vs.

MUSCODA LOCAL NO. 123, Affiliated with INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, Et al.,

Respondents.

—o—

BRIEF FOR PETITIONER

REPUBLIC STEEL CORPORATION

—o—

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BRIEF FOR PETITIONER

REPUBLIC STEEL CORPORATION

—o—

On certiorari to the United States Circuit Court of Appeals of the Fifth Circuit to review the decree of that Court entered on the 16th day of March, 1943, as modified on the 27th day of July, 1943, (R. 4997-5011) modifying and affirming as modified by a divided Court a decree of the District Court of Alabama entered on the 10th day of September, 1941.—(R. 568-9).

I

OPINIONS BELOW

The opinion of the District Court (R. 494-506) is reported in 40 Fed. Supp. 4.

The opinion of the Circuit Court of Appeals (R. 4938-4942) is reported in 135 Fed. (2d) 320.

The opinion of the Circuit Court of Appeals denying petitioners' petition for rehearing (R. 4997-5010) is reported in 137 Fed. (2d) 176.

The opinions of the Circuit Court of Appeals appear in the Appendix to petitioners' petition for a writ of certiorari at pages 64 to 77 and 77 to 95.

II

JURISDICTION

The jurisdiction of this Court is based on Section 240 (a) of the Judicial Code, 28 U. S. C. 347, as amended by the Act of February 13, 1925.

III

PARTIES

The petitioners are operators of underground iron ore mines in Alabama. They brought separate actions for declaratory judgments under the provisions of the Federal Declaratory Judgments Act, Section 247 (d) of the Judicial Code, 28 U. S. C. 409.—(R. 25, 175, 177). The actions were consolidated for trial.—(R. 487).

Philip B. Fleming, Administrator of the Wage and Hour

Division of the United States Department of Labor, was permitted on his own motion to intervene.—(R. 304-5).

It was admitted and found by the District Court that local unions named as defendants "fairly represent the class of underground ore mining employees of the plaintiffs."—(R. 565).

IV

QUESTION INVOLVED

The fundamental question involved is whether the Fair Labor Standards Act of June 25, 1938, Chap. 678, Sec. 152, Stat. 1060, requires so-called "portal to portal" travel time to be included in the computation of the "work week" as prescribed by the Act.

The phrase "portal to portal" includes all the time spent underground by the miners, exclusive of the lunch period. The phrase "face to face" includes the time spent at the usual working place. The phrase "travel time" includes all the time spent by the miner in getting from the mouth of the mine to the usual working place and returning therefrom to the mouth of the mine.

V

THE STATUTE

The pertinent provisions of the Act are as follows:

"Section 7. Maximum hours.

"(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

VI

STATEMENT

The fundamental question involved in the appeal of petitioner Republic Steel Corporation (hereinafter referred to as the Republic Company) is in all respects the same as that in the appeal of the Tennessee Coal, Iron and Railroad Company (hereinafter referred to as the Tennessee Company), and for the convenience of the Court and of parties, and to avoid repetition, the petitioner Republic Company, having secured the consent of the attorneys for the Tennessee Company, asks the permission of the Court to adopt, so far as applicable, the Brief and Argument filed herein by the petitioner Tennessee Company.

The pleadings, errors assigned, the principles of law are the same and the applicable facts are characteristic and in many respects substantially the same in the two cases.

There were differences in the methods and conditions of operations, length of slopes, distances from the portals to the working places, and collective bargaining histories, which, as petitioner contends, have no probative value so far as the fundamental question of the intent of the Congress in the enactment of Section 7 of the Act is concern-

ed. The Republic Company, however, sets out herein the following differences which might be considered substantial.

1. *The iron ore operations of the Republic Company.*

The operations of the Republic Company consisted of two: (1) Its iron ore mine at Spaulding, and (2) its iron ore mine at Raimund.

By oversight the operations at Spaulding were omitted from the original petition. Upon discovery of this oversight, and with permission of the Court these operations were added by amendment.—(R. 491-3).

The vein of iron ore at Spaulding ran from 20 to 22 feet in thickness. The thickness of the seam at the Raimund mine was about six and one-half feet. The metallic content of ore at Spaulding was much higher than at Raimund. The Spaulding mine had been re-opened in September, 1940, and the useability of the ore had been made satisfactory through the operation of a benefication plant which eliminates or reduces the silica and other foreign substances.—(R. 1908-9). The Spaulding mine was the most shallow mine on Red Mountain (the mountain in which all the iron ore mines of petitioners are located) and the Raimund mine one of the deepest.—(R. 1919). In the Spaulding mine there was no mechanical transportation and the employees walked to and from their working places.—(R. 1910). In the Raimund mine the employees were transported in cars from the tipple to the underground station, a distance of approximately 2,100 feet.—(R. 1835); the employees walked from the underground station to their places of work, and returning after the day's work had the option of either auxiliary mechanical transportation to the underground station or walking.—(R. 1838-39). The longest walking distance from the underground station at

Raimund was 7,575 feet and the shortest 2,425 feet. At Raimund the employees walked along the headings, using for the most part the roadbed of the tracks.—(R. 1839-41). At Spaulding the employees walked from the entrance of the mine to the working places and returned in a manway (not connected with haulage) which was "dry and a good way to travel."—(R. 1911). The walking distance in the Spaulding mine was approximately 500 feet.—(the exact distance is indicated on the map of the Spaulding Mine, Republic Exhibit No. 16, R. 4022)—and the time consumed by the employees in walking from the surface to the working places and return was approximately fifteen minutes.—(R. 1910). The time consumed by the employees in Raimund mine in going from portal to working places and return varied in accordance with different witnesses but in some instances and as testified to by some witnesses the time was approximately one hour and twenty-five minutes.—(R. 1901).

2. *Other differences in operation.*

There were other differences in the operations of the Republic Company, the Tennessee Company, the Sloss Company, the Woodward Company and other iron ore mining companies. None of these are of any particular materiality or relevancy. Among these the following may be mentioned:

The Republic Company, since 1936, has used electric lamps instead of carbide lamps. The lamps are rented to the employees. When carbide was used the employees bought it at various places, and the company did not, as did other petitioners, sell the carbide at the mines. When the electric lamps began to be used a place convenient to the tipple was provided where the lamps were obtained by the men contemporaneously with the deposit of their

checks.—(R. 1851-2). The Republic Company charged a fee of fifty cents per month for the privileges of the bath house, the use of the bath house being optional and some of the employees changing at home.—(R. 1849). The Republic Company used substantially the same method of depositing checks on entering the mine and taking them up on leaving as did the Tennessee Company, and for the same safety purposes.—(R. 1850-51). The Sloss and Woodward companies did not use the deposit of check methods.—(R. 1387, 1575). The character of car used for the man-trips was different in the case of the Republic Company from that of any of the other operators. In the operations of the Republic Company the work day ran from 6:30 A. M. to 2:30 P. M., and 7:00 P. M. to 3:00 A. M., with no time out for lunch period, lunch being on the company's time.—(R. 1853, 1862, 1927). The system of mining in the mines of the Republic Company was on a mechanical basis to a less degree than in the case of the Tennessee Company. The wages of the productive men of the Republic Company were on the tonnage basis, but the rates of pay were fixed on evaluations made on the hourly basis and the undisputed evidence shows that the computation and pay of service employees before and after May 1, 1941, was on an hourly basis.—(R. 1844-47). In the case of the Republic Company forty-six per cent of the employees were service employees.

Virgil Powell, a witness for respondents, was the only service employee of the Republic Company who testified in the case. Powell testified on direct examination that he ran a hoisting engine and was a company man (R. 3086); that he worked regular hours, the work usually covering nine hours. It appeared that it was necessary for him to work overtime—nine hours instead of eight—and in reference to this he testified that when he worked overtime he was paid for it.—(R. 3088).

3. *History of Contractual Relations and Collective Bargaining.*

Prior to the enactment of the Act and at the time of the trial of the case, the Republic Company had not executed a written agreement with the Smelters Union. With this exception the collective bargaining history of the Republic Company is substantially the same as that of the other iron ore mining operators. We summarize below this history:

1. Since the beginning of its operations and until May 1, 1941, the Republic Company had traditionally computed and paid, and its employees had accepted and receipted in full therefor wages on the "face to face" basis.

In reference to this we quote from the testimony of all the witnesses who testified concerning pay for traveling time in the iron ore operations of the Republic Company.

Norman E. Thompson, Superintendent of Ore Mines, testified:

> "Q I want to ask you both as to the service crews and the production crews, since you have been connected with the company and had knowledge of it, up until May 1, 1941, was the pay or the wage ever computed—the pay of the men ever computed or paid on any basis other than the basis you have described, face to face or working place to working place?
>
> "A Not to my knowledge.
>
> "Q Has there ever been any payment for traveling time to either one of those crews in going to and from their working places?
>
> "A No, sir."—(R. 1864).

J. M. Hassler, Chief Engineer for the Birmingham District and Superintendent of Industrial Relations for the

Republic Company, testified to the same effect.—(R. 2119-20).

John Butler, a contractor at Raimund mines of the Republic Company and a witness for the respondents, testified:

"Q Now, never in your experience as a miner since you have been mining in Alabama—you have never received any pay for the time you spent in traveling to and from the place where you produced the ore, have you, Mr. Butler?

"A I have not.

"Q And the custom and practice in all the mines you have ever worked in during all that period of time has been not to pay the men for any time spent in traveling to and from the place where they produce the ore?

"A Yes, sir."—(R. 3058-60).

R. H. Kendricks, M. C. Crawford and Hiram S. Peterson, in an affidavit dated October 2, 1940, among other things, stated as follows:

"All of affiants further depose that during all of the time of their employment by the Republic Company they have been acquainted with the custom and practice in the ore mine of the Company in reference to computing the hours of work for which men are paid, and know that the computation was made and the men were paid on the basis of time actually spent by them at the face or at their usual working places; that the men have always been paid and have always accepted their pay on the basis of time spent at the working place and without any consideration for the time spent in going to and from the portal of the mine to the face."—(Plaintiff's Exhibit No. 49, R. 4451).

Kendricks was an officer of the Smelters Union for a long period of time prior and subsequent to the enactment

of the Act, and he, Crawford and Peterson had been employees of the Republic Company at its Raimund operations for a great many years.

2. The computation and payment of wages, the statements of account given to the employees, the receipts of the employees acknowledging ~~time~~ monthly the receipt in full payment of all amounts due, and indicating computation and payment of wages on the "face to face" basis, the general location of the mines, operating conditions, usages in the ore mines of petitioner, as set out in reference to the operations of the Tennessee Company, are substantially the same in reference to the Republic Company. The facts in reference to the contractual relations (with the exception of the executed contracts with the Smelters Union) are substantially the same.

We summarize the evidence relating to the contractual and bargaining negotiations between the Smelters Union and the Republic Company as follows:

(a) The Smelters Union was organized at Raimund sometime in 1933 and has remained there ever since. Since its organization the company has met regularly with committees of the Union, these meetings have been held "at least once a month, sometimes oftener, depending on the amount of negotiations we had."—(R. 1867). The testimony and exhibits disclose that with the exception of the times set out hereinafter the union never made any suggestion of changing from the "face to face" basis of wage computation and payment, or of being paid for any portion of the traveling time.

(b) At one of the meetings held with the Union Committee on *September 30, 1933*, the Smelters Union Committee presented to the management its written communication under seal setting out thirteen demands, the sixth demand reading as follows:

"* * * and (6) the men enter the mine on their own time and come out of the mine on the company time."—(Republic Exhibit No. 2, R. 3975, 1868).

This was the first time that any demand or request had ever been made by the committee. So casual was the demand that it was not brought up for discussion at the meeting of the committee with the management.—(R. 1870).

(c) On *December 21, 1933*, the Smelters Union filed with the "Regional Board operating under the National Labor Board by the Authority of the United States under the National Industrial Recovery Act"—(the progenitor of the Fair Labor Standards Act)—its complaint making a number of charges against the company including substantially the same demands which were included in Republic Exhibit No. 2, supra. Among these demands was the following:

"6. That the men be not required to enter and leave their place of work on their own time."—(Defendants' Exhibit No. 9, R. 4581, 4586).

This complaint stated that the Union was functioning with 97 per cent membership of the entire employees of the company, and was signed on behalf of the Union by Byrd H. Barksdale and J. A. Lipscomb, Mr. Lipscomb being one of the attorneys of record for the Union in this case.

Attached to the charges was a copy of the grievances presented to the company on the *30th day of September, 1933*, by Republic Exhibit No. 2, supra.

A hearing was held on this complaint before the Board in Atlanta, Georgia, and at that time no complaint or demand was made in reference to the charge in the complaint that the men should not be required to enter and leave their places of work on their own time.—(R. 1870).

The complaint before the Regional Labor Board was settled on *January 15, 1934*, the terms of the settlement being stated in a letter directed by counsel of the Republic Company to Mr. Marion Smith, Chairman of the Board.—(Republic Exhibit No. 3, R. 3976, 1873). This agreement not only made no provision for the payment for any portion of the travel time, but provided that the men would return to work on the same eight hour day that they had previously worked and the men returned to work on the "face to face" basis.—(R. 1874).

(d) On *March 13, 1934*, the Union presented to the company another written list of grievances and demands, the tenth of which was in the following language:

> "That the men be not required to enter and leave their place of work on their own time."—(Republic Exhibit No. 4, R. 3978-80).

In the discussion with the Union Committee in reference to these demands there was no mention made of and no discussion about this demand.—(R. 1878). There was no change made after the presentment of these demands and the operations of the company remained on the "face to face" basis.

(e) In *1934* the employees of the company engaged in the general strike on the mountain and closed down the Raimund mines. Conciliation negotiations in reference to the Republic Company's operations were had, George Cole, the International Vice-President of the Union, and the members of the Union Committee representing the employees and Conciliator Richardson the Government.

As a result of these negotiations the strike was settled; an adjustment of wages by way of an increase was made, and the men returned to work on the "face to face" plan which had previously prevailed.—(R. 1878-9).

The correspondence referred to as the Perkins letter of understanding, which set forth the terms under which the men returned to work, was substantially the same in the case of the Republic Company as it was in the case of the Tennessee, the Sloss and the Woodward companies.—(Republic Exhibit No. 5, R. 3983-90; 1880-81). The letters on behalf of the Union were signed by George B. Cole, International Vice-President, and its local committeeman, Rufus Kendrick (one of the affiants whose affidavit is quoted *supra*), and the letters on behalf of the Republic Company by its District Manager.

The men agreed to and did return to work on the "face to face" plan, and again no contention was made during the negotiations concerning payment for any portion of the travel time.—(R. 1881).

The wage scale attached to the letter of understanding shows an increase of rates of pay to all the service employees and of the drag tonnage rates to drill helpers and muckers of the productive employees.—(Republic Exhibit No. 5, R. 3988-90).

(f) On *June 17, 1935*, the Union presented to the Republic Company a proposed complete labor agreement. This proposal contained the following suggestion in reference to travel time:

> "9. It is agreed that the employees shall enter the mine on their own time and come out on the company's time."—(Republic Exhibit No. 6, R. 3991, 3994).

A meeting was held with the committee that presented these demands and again no insistence was made upon the demand and there was no discussion with reference to it.—(R. 1884).

On *July 13, 1936*, the company made a written reply to the demands of the Union as set forth in Republic Exhibit

No. 6, stating, among other things, that the company intended to continue its present policy which had given satisfaction for the past twelve months, that the demands were denied, and that operations would proceed in accordance with the Perkins letter of understanding until such time as it might be indicated that this arrangement was no longer practicable.—(Republic Exhibit No. 8, R. 3996). The employees continued to work on the "face to face" plan.—(R. 1884-1888).

(g) On *May 26, 1936,* the same letter was directed and delivered to the Republic Company as was directed and delivered to the Tennessee Company.—(T. C. I. Exhibit No. 10 and 10-A, R. 3627, 3629). This proposal of the union contained this provision:

> "The eight hour day means eight hours in or about the mines at the usual working places for all classes of work."—(Republic Exhibit No. 7, same as T. C. I. Exhibit No. 10 and 10-A, R. 3627, 3629, 1885).

(h) On *December 26, 1939,* the Union sent to the company by registered mail a letter enclosing a proposed agreement in all respects identical with Republic Exhibit No. 9 presented to the company on September 26, 1939, and which made no reference to traveling time.—(Republic Exhibit No. 10, R. 4003-4; Republic Exhibit No. 9, R. 3997).

It is undisputed that during all these negotiations the employees, with knowledge, continued to work on the "face to face" basis; that the only demands or requests they ever made for payment of traveling time were as stated above, and that in all instances these requests were made casually, never insisted upon, and finally abandoned by presenting requests for the making of a contract which, in express terms, defined the work day to be "eight hours at the usual working places."

(i) On *January 9, 1939,* the Smelters Union filed charges before the National Labor Relations Board, and on *May 1, 1940,* filed an amended charge.—(Republic Exhibits Nos. 11 and 12, R. 4004, 4007). These charges abandoned the previous demand which was made in the charges before the Regional Labor Board and made no complaint against, or requested changing, the traditional "face to face" basis of wage computation and payment.

It is undisputed that the settlement of these charges was made by stipulation, the stipulation being signed by Borden Burr as attorney for the company, J. A. Lipscomb as attorney for the Smelters Union, Horace C. Wilkinson as attorney for Brotherhood of Captive Mines, and Alexander E. Wilson, Jr., as attorney for the National Labor Relations Board (Republic Exhibit No. 13, R. 4009, 4012), that during this proceeding there was no "claim or complaint on the part of the Union that they were not being paid or should be paid for any portion of the traveling time, and that they ought to be paid for it, and that they continued to work on the 'face to face' basis."—(R. 1897).

(j) On *October 12, 1940,* the union presented, after the press release in the *Cornucopia Gold Mine Case,* to the Republic Company the same resolution which was presented to the Tennessee Company and the Sloss Company giving notice of its claim for "portal to portal" pay.—(Republic Exhibit No. 14, R. 4018).

4. *Operations of the Republic Company subsequent to May 1, 1941.*

The Republic Company, under the compulsion of the opinion of the Administrator on May 1, 1941, changed its operations so as to prevent its employees from remaining underground in excess of eight hours per day and forty hours per week. The means of effecting this change were

different from the other petitioners and were substantially as follows:

Prior to May 1, 1941, all the underground employees of Raimund Mines entered the mines at Number 2 Slope. Since May 1, 1941, all the employees deposit their checks at Number 2 Slope, and a portion of them enter the mine at Number 2 Slope, and the remainder are transported by bus to Number 1 Slope where they enter the mine, being compensated (pursuant to the opinion of the Administrator) for the time spent in this bus transportation. The average decrease per man in working time at the working place since May 1, 1941, has been about an hour and twenty five minutes, and with an increase in force of 25 or 30 men (the mining operations, other than the changes in transportation and the addition of men remaining the same), production has decreased on an average between 225 and 250 tons per day at the Raimund Mines.—(R. 1900-1903).

5. *The undisputed facts proved that prior to the enactment of the Act the "face to face" method of computing and paying wages had been recognized and approved by the industry, public and quasi-public authorities, the public generally, statutory enactments of like import and similar purpose, and administrative rulings on eight hour and similar laws.*

At the risk of some repetition we summarize somewhat chronologically the facts and conditions as they existed at the time of and prior to the enactment of the act, of which the Congress must be presumed to have had knowledge, and to have legislated in the light of such knowledge in the enactment of the Act:

1. From time immemorial it had been the traditional custom of the iron ore mining industry in Alabama and elsewhere in the United States to compute and pay wages

on the "face to face" basis and there had never been so far as the evidence disclosed a ton of ore extracted in Alabama or elsewhere in the United States on the "portal to portal" basis.

2. All written agreements which had been negotiated through the process of collective bargaining had expressly provided for the computation and payment of wages on the "face to face" basis.

3. Jobs in the Alabama ore mines had been classified and evaluated, wages had been fixed and paid, the cycles of mining operations had been arranged, and wage increases and other valuable rights given to the miners had been based on the "face to face" basis.

4. At least twice a month the employees had received written statements indicating that their earnings were computed on the "face to face" basis, and upon receiving the amounts thus shown to be due them, they acknowledged in writing payment in full of all wages due them.

5. It had been the universal, traditional custom in the bituminous coal mines of Alabama, and in the bituminous and anthracite coal mines of the United States to compute and pay wages on the "face to face" basis, and there had never been so far as the evidence disclosed a ton of bituminous or anthracite coal extracted in the United States on the "portal to portal" basis, and from as early as *1898* this traditional practice had been embodied in all the written agreements negotiated and reached by the coal operators and the United Mine Workers of America representing over half a million coal miners.

6. In *1903* an arbitration board presided over by Judge George Gray recommended, and the Mine Workers Union and the Alabama operators, including petitioners, pursuant to the recommendation, executed a wage agreement providing for the "face to face" basis.—(R. 2193).

7. On *October 25, 1917*, the Peale-Garfield arbitration award expressly provided for the "face to face" basis.—(R. 4694-5).

8. On *March 9, 1920*, President Wilson approved the award of the Bituminous Coal Commission, and, on the basis of this award and approval, the operators and the Mine Workers Union, on *March 31, 1920*, executed a wage agreement expressly providing for the "face to face" basis. —(R. 4696, 4759).

9. On *September 18, 1933*, President Roosevelt, on the recommendation of the Administrator of the National Industrial Recovery Act, acting under the Authority of the National Industrial Recovery Act (the progenitor of this Act) approved the Code of Fair Competition for the Bituminous Coal Industry, as agreed upon by the industry and the Mine Workers Union, and which expressly provided for the "face to face" basis.—(R. 4701-5).

10. On *September 21, 1933*, President Roosevelt approved the Appalachian Agreement which expressly provided for the "face to face" basis.—(R. 4787).

The Courts below sustained respondents' objections to the introduction in evidence of all the above, and other matters relating to coal mines.

The petitioner assigns this as error.—(p. 30, infra). It submits, however, that all said matters are of public record and the Court will take judicial notice thereof.

11. Alaska (Sec. 2132 Compiled Laws of Alaska), Arizona (Sec. 1958, Arizona Revised Codes, 1928), Utah (Chap. 59, Laws of Utah, 1937), and Nevada (Sec. 10237, Nevada Compiled Laws) had all by plain and express statutes included travel time by a limitation of permissible hours underground. These were the only states in the United States which had thus adopted a policy similar in purpose to the "portal to portal" basis.

12. In *1909* California enacted an eight-hour law for persons employed in underground mines.—(Statutes, Page 279, Chap. 181, approved March 10, 1909).

The Supreme Court of California, in construing this statute, held that the eight hours included only the work at the face of the mine and excluded travel time.—Ex Parte Martin, 109 Pac. 238-9.

Subsequently, and at times when the decision of the Supreme Court of California was the only outstanding construction, many other states enacted substantially similar statutes to the California statute, and, presumably adopted the construction of that court.

13. Whenever any question calling for the construction of laws of similar import had been submitted to the construction of administrators of federal laws or governmental departments without exception the construction given had been in harmony with the ordinary and usual meaning accorded to the word "work," namely, that it meant productive work and did not include the time spent in going to and from the place of work.

Petitioner respectfully asserts that at the time of the enactment of the Fair Labor Standards Act all previous administrative, legislative and judicial actions or interpretations of this question had been such as to expressly exclude travel time from work time. There were none to the contrary.

6. *The undisputed facts proved that subsequent to the enactment of the Act the "face to face" method of computing and paying wages was recognized by the Administrator of the Act, the industry, other and allied industries, the beneficiaries under the Act, public and quasi public authorities, and the public generally.*

1. Petitioners and their employees (represented by strong national unions), and the iron ore mining industry throughout the United States continued, after the enactment of the Act, to operate on the "face to face" basis; this traditional concept of the day's work continued to be embodied in all the executed written agreements; and the employees received increases in wages, additional pay through incentive plans, and other valuable considerations based on the "face to face" basis.

2. On *July 27, 1940,* the Administrator of the Act approved the "face to face" basis of computation and payment of wages for the bituminous coal mining industry.—(R. 4717).

The Administrator has never changed or departed from this ruling.

3. The Administrator induced or allowed the iron ore mining industry to continue the computation and payment of wages on the "face to face" basis until he rendered his Modified Portal to Portal Opinion on March 23, 1941, and indicated his doubt and uncertainty by stating in the release of the opinion that because the Division had not theretofore taken a definite stand it would not seek to compel the payment of restitution from mine owners who had not been operating on the "portal to portal" basis.—(R. 78).

This release of the Administrator stated that the Alabama mines had always operated on the "face to face" basis.

4. The Attorney General, charged with the enforcement of the Act, has never sought to enforce the "portal to portal" interpretation in reference to iron or coal mines.

5. The coal mining industry continued until recently

to compute and pay wages on the "face to face" basis either under collectively bargained wage agreements or directives of the government.

6. At the time of the announcement of the decision under review the Mine Workers Union and the bituminous coal operators were negotiating for a new agreement to take the place of the agreement expiring on March 31, 1943. During the past nine months the bituminous coal industry has been in complete chaos, three general strikes having occurred closing substantially all the bituminous coal mines in the United States. The Union demanded, on the basis of the decision under review, the insertion in the agreement under negotiations of a provision requiring "portal to portal" compensation. It also demanded reimbursement by way of overtime compensation for all travel time since the enactment of the Act, and suits were brought and are pending seeking to recover this compensation and inflict upon the operators the severe penalties of the Act.

During these nine months the government, under direction of the President, has twice taken possession and management of the bituminous coal mines and at this time has possession and management of the greater portion of the coal mines.

The War Labor Board declined to approve agreements (the first Illinois contract) submitted by the operators and the Mine Workers Union which provided for compensation for travel time on a basis in conflict with its former decision. The Board called attention to the facts and arguments set forth in the Houck letter—(Appendix, Tennessee Company Brief)—and emphasized the difficulties and complexities which would follow the overruling of the traditional "face to face" practice and the institution of the "portal to portal" basis.

Finally the War Labor Board approved the second Illi-

nois contract which provided for a complicated formula of computing and paying the miners wages, and included payment for travel time at a different rate from that paid for the productive work, and on an arbitrarily assumed travel time of forty-five minutes for all inside coal mine workers.

The War Labor Board has also recently approved an agreement between the Coal Producers Association of Illinois and the American Federation of Labor Progressive Mine Workers which carries forward previous provisions of the contract, made provision for settlement of "portal to portal" compensation from April 1 to November 1, 1943, on the basis of $40 per miner, but made no provision for compensation for future travel time other than a clause which provides that if any competitive field makes a labor contract with terms more favorable to the unions or the operators then the agreement will be revised accordingly.

In further recognition of the uncertainty and complexities arising out of the demand of the Mine Workers (stemming from the decision of the Circuit Court of Appeals) for portal to portal compensation the President of the United States appointed a committe to investigate and report to the War Labor Board on the facts relative to travel time in the bituminous coal mines. The questionnaire sent out by this committee gives detailed instructions as to how the questionnaire is to be answered in reference to travel time in slope mines, shaft mines, and drift mines, and indicates the many different methods to be used in locating the portal and in furnishing the required information.

On *December 11, 1943*, upon the insistence of the Secretary of the Interior, additional operators, producing a large tonnage of coal, have agreed with the Mine Workers Union (subject to the approval of the War Labor Board, an

increase in the maximum price of coal sufficient to cover the increased cost occasioned by the agreement, and other conditions) upon a proposed agreement which includes substantially the provisions previously included in the Illinois agreement, commonly known as the Lewis-Ickes agreement, and provides for a work day of eight hours and forty-five minutes (including an assumed forty-five minutes for travel time) with fifteen minutes of the former thirty minutes lunch period made a part of productive work making an overall day of nine hours.

The proposed agreement also contains the following clauses:

"14. There shall be paid to each employee on the pay roll of the employer from April 1, 1943, to June 20, 1943, as his distributive share of and in full of all amounts due for portal to portal since April 1, 1943, the sum of Forty ($40.00) Dollars payable in equal installments during the four months commencing on the first day of the calendar month following the effective date of this Supplemental Agreement. Any employee on the payroll during said period for a time less than the full said period shall be paid a corresponding pro rata share of such Forty ($40.00) Dollars.

"15. The payments herein provided for shall be construed to be in full settlement and discharge of all portal to portal compensation accruing prior to April 1, 1945, and in settlement and discharge of all pending litigation by the mine workers against the operators and by the operators against the mine workers signatory hereto for such portal to portal compensation. In consideration of such acceptance and discharge the operators and mine workers signatory hereto agree that all actions at law and suits in equity heretofore instituted by them involving the question of portal to portal compensation shall be dismissed. This paragraph shall be without prejudice to any right of any party signatory to this Supplemental Agreement arising after April 1, 1945."

The matters set forth above (6) are of such common knowledge that the Court will take judicial notice thereof.

VII

THE CONTEXT OF THE FAIR LABOR STANDARDS ACT OF 1938.

The context of the Fair Labor Standards Act shows that the word "workweek" [Section 7 (a)] was used in accordance with the concept of the industry and in a much more restricted meaning than the words "on duty" as used in the Hours of Service Act relative to railroads (U. S. C. A., Title 45, c. 3, Sec. 62); or the words "arising out of or in the course of employment" [*Bountiful Brick Company v. Giles* (January, 1928), 266 U. S. 154, 72 L. Ed. 507] as generally used in workmen compensation acts; or the words "injury sustained while in the performance of his duty" as used in the compensation law as to public employees (U. S. C., Title 45, Chap. 16, Sec. 75-1); or the words "arising out of or in the course of employment" as used in the Longshoremen and Harbor Workers' Compensation Act (U. S. C., Title 33, Section 802).

We quote from the Fair Labor Standards Act:

"Section 3 (g): 'Employ' includes to suffer or permit *to work*.

* * * * *

"(j): 'Produced' means produced, manufactured, mined, handled, or in any other manner *worked* on in any States; and for the purpose of this chapter an employee shall be deemed to have been engaged in the *production* of goods if such employee was employed in producing, manufacturing, mining, handling, transporting or in any other manner *working* on such goods, or in any process or occupation necessary to the production thereof, in any State."

Section 5 of the Act provides for the appointment by the Administrator of an industry committee for each industry, and Section 8 provides for the issuance of wage orders, and, following hearings and the recommendations of the industry committee, the fixing of the minimum rate for the industry; and requires, in the fixing of such minimum rate, the consideration, among other relevant factors, of the following:

"(1) competitive conditions as affected by transportion, living and production costs;

"(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

"(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum wage standards in the industry."

Other provisions of Sections 2 and 8 of the Act emphasize the purpose of the Congress to determine these matters on an industry basis, and assure the opportunity for all members of the industry under consideration to have due notice of the hearings and full opportunity to be heard before the decisions of the Administrator, or the recommendations of the industry committee shall become effective.

VIII

THE LEGISLATIVE HISTORY OF THE FAIR LABOR STANDARDS ACT OF 1938.

The Court will take judicial notice of the following:

1. The National Industrial Recovery Act, enacted by the Congress on June 16, 1933, was the progenitor of the

National Labor Relations Act and of the Fair Labor Standards Act.

This Court, on May 27, 1933, declared NIRA unconstitutional.

The Congress subsequently, for the purpose of legislating in reference to the two fundamental objects of NIRA, enacted the National Labor Relations Act and the Fair Labor Standards Act, the former Act covering the protection and maintenance of the rights of collective bargaining, and the latter minimum wages and maximum hours.

The codes of fair competition adopted or promulgated under the provisions of NIRA became complete employer and employee charters covering minimum wages and maximum hours.

The Bituminous Coal Code, stemming from negotiations between the United Mine Workers of America and the various coal associations, was approved by the President of the United States, by the Administrator, and by the industry. The code thus adopted expressly provided for computation and payment of wages on the traditional "face to face" basis.—(R. 4705).

2. Representative Keller, a member of the Conference Committee, in debate preceding the final passage of the Fair Labor Standards Act, June 14, 1938, said:

> "This bill eliminates the defects and preserves the best features of the National Industrial Recovery Act. In doing so a better procedure is provided, so that no right may be affected without an opportunity to be heard. NRA put down a floor for wages and a ceiling to hours of work."—(Vol. 83, Congressional Record, Part 8, p. 9264, 75th Congress, Third Session, June, 1938).

3. The Senate Committee, in paragraph II of Report of July 6, 1937, said:

"The right of individual or collective employees to bargain with their employers concerning wages and hours is recognized and encouraged by this bill. It is not intended that this law shall invade the right of employer and employee to fix their own contracts of employment, wherever there can be any real, genuine bargaining between them. It is only those low-wage and long-work-hour industrial workers who are the helpless victims of their own bargaining weakness that this bill seeks to assist to obtain a minimum wage."—(Senate Report No. 884).

4. On June 2-22, 1937, joint hearings on the Fair Labor Standards Act were held before the Committee on Education and Labor, United States Senate, and the Committee on Labor, House of Representatives. The following excerpts from the Joint Hearings are quoted:

"MR. LEWIS: * * * My recommendation as to rate of pay is a minimum of 40 cents per hour. As to hours of work, the standard in my opinion should be 5 days of 7 hours each or 35 hours per week, with authority granted to the Board to expand to a 40-hour maximum or to reduce to a 30-hour minimum * * *.—(p. 272).

"SENATOR LaFOLLETTE: * * * As I understand it the objective of this bill as outlined in Section 23, one of them is to prevent the Board from going in and upsetting collective bargaining agreements or entering the field where collective bargaining is actually functioning in a bona fide manner, and thereby producing the result of the action of the employer and employee represented by genuine and effective labor organization."—(p. 280).

"MR. LEWIS: * * * For instance, frankly I would not want this bill to convey power to a board to order an investigation into all of the wage agreements in the mining industry right now, or to give the Board power to decide that the collective bargaining agreements in the mining industry were not sound, not proper, were confiscatory, or not in harmony with the facts of the industry, and order a modification thereof. I think the power

of the Board should be limited to cases which run below the level of the standards fixed by Congress. I see endless confusion in the adoption of Section 5 now. I see a drift towards the complete fixation of wages in all industry by governmental action."—(p. 281-2).

"THE CHAIRMAN: As I understand your position, boiled down, with reference to the minimum wage—I want to be sure—it is that you favor a minimum wage law written in such a way that it will preserve to the utmost the right of bargaining between employers and employees, but which will at the same time raise the low, substandard conditions of millions of people, those who have been living in that sphere and have not as yet been able to elevate themselves either by their own bargaining or by collectively bargaining?

"MR. LEWIS: That is correct, Senator."—(p. 307).

5. During the Senate debate on the bill on July 29, 1937, the following statements were made:

"MR. WALSH: Next does the bill affect collective bargaining agreements already made or hereafter to be made between employers and employees?

"MR. BLACK: It does not.

"MR. WALSH: There is one exception to that, is there not? The bill does affect collective bargaining agreements where the hours are less than 40 per week, or where the wages are more than 40 cents per hour?

"MR. BLACK: That is correct.

"MR. WALSH: But if a collective bargaining agreement had been entered into at 36 cents per hour wages, the Board would have jurisdiction to set that agreement aside and to fix, if the facts warranted, a minimum wage of 40 cents?

"MR. BLACK: The Board would have jurisdiction to do it, but under the provisions of the law it would be my judgment that the board would be very reluctant, indeed, to attempt to interfere with a bona fide agree-

ment made between employers and employees."—(Congressional Record, Vol. 81, p. 7650).

IX

THE CONGRESS, IN RECENT YEARS, HAS BEEN ZEALOUS IN DEFINING THE RIGHT AND MAINTAINING THE RESULTS OF COLLECTIVE BARGAINING.

National Labor Relations Act, July 5, 1935, c. 372, 49 Stat. 449;

Railway Labor Act, May 20, 1926, c. 347, 44 Stat. 577; 48 Stat. 1186, June 21, 1934;

Norris-LaGuardia Act of March 23, 1932, c. 90, 49 Stat. 70;

War Labor Disputes Act, June, 1943, 78th Congress.

X

ERRORS OF THE CIRCUIT COURT OF APPEALS

1. The Circuit Court of Appeals erred in affirming the decision of the District Court that travel time was to be computed in determining work time.

2. The Circuit Court of Appeals erred in holding it was the intention of the Congress in the enactment of Section 7 (a) of the Fair Labor Standards Act of 1938 to constitute all the time spent underground by the employee a part of the work week.

3. The Circuit Court of Appeals erred in holding that the question whether travel time should be included in the computation of work time was a question of fact to be determined by the trial tribunal.

4. The Circuit Court of Appeals erred in sustaining the findings of the District Court on the ground that they were not clearly erroneous.

5. The Circuit Court of Appeals erred in sustaining the finding of the District Court that there was no custom not to include travel time in the computation of work time though conceding, arguendo, "that for twenty-five years prior to 1938 iron ore miners had not been compensated for travel time, and that even after 1938 the parties to this suit had entered into contracts whereby it was agreed that no wages should be paid for travel time."

6. The Circuit Court of Appeals erred in holding that it was the intention of the Congress in enacting the Fair Labor Standards Act to regulate the environment and physical conditions of work and that travel time was a part of work time because of its discomforts and hazards.

7. The Circuit Court of Appeals erred in disregarding the exclusion by the District Court of relevant evidence.

8. The Circuit Court of Appeals erred in including the employees of petitioner at its Spaulding mines within the ambit of its judgment and opinion.

9. The Circuit Court of Appeals erred in affirming the decision of the District Court that there did not exist a justiciable controversy between petitioners and respondents in reference to the construction of Section 7 of the Act for the time subsequent to May 1, 1941.

XI

ARGUMENT

IT WAS NOT THE INTENT OF THE CONGRESS TO OVERTURN TRADITIONAL CUSTOMS AND TO INVALIDATE AGREEMENTS BASED THEREON

Petitioner asserts that when the Fair Labor Standards Act was enacted traditional customs and all wage agreements had established the "face to face" method as the standard and measure for computing work time in the iron ore mining industry.

The District Court held that there was no such custom. It assigned as a reason for this holding that the men were employed on a tonnage or task basis and that the employees were actually paid for eight hours work though in fact they may have actually worked less than eight hours.

Not only are these reasons in absolute conflict with the evidence relating to service employees, but they are untenable in reference to the productive employees. There is no evidence in this record to support this finding and the undisputed evidence is to the contrary both in respect to the traditional practice and contractual relationships. The fact that this petitioner had not executed written wage agreements with the Union does not in anyway militate against this conclusion. A verbal or implied agreement to pay wages is as effective as a written agreement.

In the case of *Williams v. Jacksonville Terminal Company,* 315 U. S. 398 (6-8), this Court gave validity to an implied agreement in reference to the application to the Company's credit of tips of the red caps notwithstanding

continuous protestations against such application by the employees, and held that because the employees remained at work subject to the requirements of the employer a new contract was created.

The Circuit Court of Appeals, while admitting the right of parties to bargain in full exercise of freedom of contract, erroneously affirmed the judgment of the District Court by holding that the agreements were invalid because in conflict with Section 7 of the Act. It based this conclusion on two clearly untenable grounds: (1) That the agreements were contrary to the purpose of the Act which was to eliminate "labor conditions detrimental to the general welfare of the employees," and because the "industrial custom" (admitted *arguendo*) did not "warrant the continuation of abuses that the Act was created to rectify"; and (2) a suggested lack of bargaining equality between the parties.

The first reason is disproven by the history of the Act, including statements made in committee reports, the joint conference report of the Senate and House Committees, and the debates when the Act was under consideration.—(Tennessee Company Brief, pp. 25-28). It is crystal clear that it was not the intention of the Congress in the enactment of the Act to police the many industries for perils or discomforts or to litigate as to any conditions of employment other than those relating to minimum wages or maximum hours.

The lack of logic in this reasoning by the Circuit Court of Appeals is demonstrated by its holding in the decision that lunch time spent among the alleged perils near the working places is not work, but the time spent in transportation or in waiting for transportation, where the dangers and discomforts are much less, is work.

This lack of logic becomes even more glaring when judi-

cial notice is taken of the fact that in the recent government approved coal agreements as negotiated first by Secretary Ickes and the Mine Workers Union and subsequently in the Illinois contract and as now proposed in other contracts it is provided that the miners must spend fifteen minutes of their lunch period in productive work, and is further provided that the miners must spend underground a total of nine hours a day for six days in the week. Surely an official recognition that miners shall be required by contract to spend a minimum of nine hours underground is out of harmony with the construction of the Act that it was the intention of the Congress to ameliorate or eliminate underground perils.

In the second place no support can be found for the suggestion of the Circuit Court of Appeals that these wage agreements are void because the parties, directly making them or impliedly agreeing to them, lacked bargaining equality. The record in this case so convincingly answers such a suggestion that no further comment is necessary.

E. I. duPont de Nemours and Co. v. NLRB, 116 F. (2d) at Page 398.

THE QUESTION AS TO WHAT CONSTITUTED WORK WAS ONE OF LAW AND NOT OF FACT AND IT WAS THE INTENTION OF THE CONGRESS FOR THE ESTABLISHED PRACTICES AND EXISTING CONTRACTS OF THE PARTIES AND OF THE INDUSTRY TO BE TAKEN INTO CONSIDERATION IN DETERMINING THIS QUESTION.

The majority of the Circuit Court of Appeals did not finally hold as a matter of law that it was the intention of the Congress to set aside the traditional custom and to void the agreement, but admitting arguendo, the existence

of the custom, and emphasizing the right of contract; held that the cases of petitioners were, on the facts, border line cases and affirmed the judgment of the District Court by invoking the rule that findings not clearly erroneous should be sustained, that the effect of the custom and of the agreements was purely evidentiary—not matters of law — and, therefore, the findings of the District Court could not be disturbed because the fact finding tribunal had concluded, after hearing the evidence, that no weight should be given to the custom or the contractual agreements.

The District Judge in his opinion stated:

> "In the last analysis, therefore, plaintiffs must stand or fall on the question whether the time in issue was employment and work, as a matter of simple fact."—(R. 500).

In its opinion on original hearing the Court of Appeals stated:

> "What constitutes working time is a question of fact depending upon the particular circumstances, and is a matter for the determination of the courts in controverted cases. In the great majority of instances no questions of this nature will arise, but in doubtful cases such as this the issue must be determined in accordance with common sense, and the general concept of work or employment;"—(The Court ignores the fact that the "general concept" of the industry, of the unions, of the employees, and of all who had been charged with administration and interpretation—save only the belated opinion of the Administrator—had been at all times on the "face to face" basis)—"and, as in other cases, the appellate court is controlled by the rule that the finding of the trial court upon decisive questions of fact must be upheld unless it is clearly erroneous."—(R. 4939-4940).

Upon rehearing the Court of Appeals amplified its view that this question was one of fact:

> "Was the finding of fact of the court below as to work-

ing time clearly erroneous? In reviewing the decision of the trial court we are bound by Rule 52 of the federal rules of civil procedure, which provides that: 'Finding of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness.'

"Even where there is no dispute about the facts, if different reasonable inferences may fairly be drawn from the evidence, an appellate court is forbidden to disturb the findings based on such inferences unless they are clearly erroneous. That this dispute turns upon questions of fact does not withdraw it from a judicial cognizance in an action for a declaratory judgment. 'The legal consequences flow from the facts and it is the province of the courts to ascertain and find the facts in order to determine the legal consequences. That is every day practice.' (Citing Aetna Life Ins. Co. v. Haworth, 300 U. S. 242). The parties saw fit to submit the issues of fact to the court, without a jury, but this does not render indistinguishable the issues of law and fact. What constituted the workweek of these employees and how many hours they were suffered or permitted to work are questions of fact."—(R. 5001).

Further on rehearing the Circuit Court of Appeals said:

"Whether one is working, resting, idling, playing or preparing to work is as much a matter of fact as whether one is asleep or awake, or is laughing or crying. In Skidmore v. Swift & Co., ... F. (2d) ...., this court recently held in an action for overtime compensation under 29 U. S. C. A. 207, that the burden was on the employees to segregate the actual hours of their employment from the time spent by them in playing, sleeping, bathing, shaving and dressing. So we say the Act does not define these instances; their peculiar character must be determined by evidence. Two people may be in swimming, an instructor and his pupil; one will be working and the other playing. The working time of *every miner** is a

*Notwithstanding this conclusion, the Court rendered a judgment that *all time per se* spent underground must be treated as a part of the work week although the individual miner or employees in a particular mine, i.e., the Spaulding mine of petitioner, may have never been submitted to perils and discomforts and may have never committed any of the acts the commission of which the Court held caused all time underground to be a part of the work week.

definite controlling fact that can and must be finally determined in order to fix the amount of wages due him under the federal statute. It is a fact that cannot be found in any statute or decision or law book (except statute not applicable to this case), but must be determined by the court or jury in any justiciable controversy wherein a real issue arises with respect thereto."—(R. 5005).

It is, we submit, a matter of law as to what constitutes work, though whether an employee actually is engaged in work is a matter of fact. No one could deny that the mining and handling of the iron ore which the employees are hired to produce are activities constituting *work*. Of course, it is true that whether an individual employee is engaged in working, resting, idling, playing, or eating, is a question of fact. It is respectfully submitted that the Courts below became confused from their failure to separate the two concepts. They are as distinct as are the legal definitions and constituents of murder and the question of whether a defendant has committed murder.

Circuit Judge Sibley, in his dissenting opinion, we submit, correctly and tersely defined work:

> "It seems to me that a man is at work, for the purpose of the Act, when he is doing what he is hired to do. It may involve mental or physical efforts, or it may consist in simple presence. It all depends on the contract of hiring."—(R. 4942-3).

"What he is hired to do" is a matter of construction of the contract of employment, and hence for the Court to decide. Whether the employee is actually doing or performing "what he is hired to do" is, of course, a question of fact.

The constitutional base of the Act was the prevention on unfair competition in commerce.

United States v. F. W. Darby Lumber Co., 312 U. S. 100; 61 Sup. Ct. Rep. 451-63.

If the Act should be construed to restrict the rights of the parties to enter into and carry out contracts further than necessary to assure fair competition in commerce, then it might deprive them of their liberty of contract in violation of the Fifth Amendment.

West Coast Hotel Co. v. Parrish, 300 U. S. 379, overruling *Adkins v. Children's Hospital*, 261 U. S. 525.

THE DECISION OF THE CIRCUIT COURT OF APPEALS NECESSARILY BRINGS ABOUT "UNFAIR COMPETITION IN COMMERCE."

It cannot be contended that the traditional custom and the contractual agreements to compute and pay wages on the "face to face" basis in any way restrict or interfere with fair competition in commerce. On the contrary, due to the inequalities, complexities and discriminations which it is admitted by all will result (and are now resulting, p. 2027, supra) from the forced imposition of the "portal to portal" basis, unfair competition in commerce will necessarily result. This is made clear not only by the statements in the Houck letter, the decisions of the War Labor Board, the provisions of the recent Ickes-Lewis agreements, but by the undeniable fact that the mine which is compelled to pay, contrary to traditional custom, contracts and physical conditions greater compensation for longer travel time is placed at a competitive disadvantage with the mine which will pay for shorter travel time. It can be definitely stated that the travel distances in every instance vary as between different mines and as between different working places in the same mine. There is probably no single miner, and cer-

tainly no group of miners, whose travel time does not vary with almost every day's work.

The judgment of the Circuit Court of Appeals is, therefore, in direct conflict with the main purpose of the Act and its constitutional base.

EMPLOYEES OF SPAULDING MINE OF PETITIONER IMPROPERLY INCLUDED WITHIN THE JUDGMENT

There is not a scintilla of evidence in this case to justify the judgment of the Circuit Court of Appeals in including within the coverage of the judgment the employees of petitioner's Spaulding Mine. There was no evidence to show mine perils or discomforts in this mine. On the contrary, the men went to and returned from their places of work by walking a comparatively short distance on "a very good way to travel."—(R. 1911). The inclusion in the judgment of the Spaulding employees is an illustration of how far the question of payment for travel time may be extended if the Circuit Court of Appeals is correct in its holding that what constitutes work becomes in all cases a matter for the determination of the trial tribunal. If the travel time of the Spaulding mine employees of petition is work, then, by the same token, all time spent by employees upon the premises of their employer or in traveling to and from work may likewise become work time. The implications and reverberations of such a holding are almost beyond the imagination.

Employees of sawmills, of pulpwood producers, and of many other industries ride to and from their places of work in conveyances of their employers; employees of operators of open pit mines are transported and walk long distances to their machine shovels; manufacturing plants are within enclosures and their employees check in at the gates and then walk long distances to report for work to their

foreman at their places of work; home workers with the furnished material and their finished product ride through crowded subways to and from the business lofts of their employers, and in these instances (and myriad of like instances) the concept of work prior to enactment of the Act had been established by custom and embodied in agreements. Did the Congress intend to overrule the custom, to invalidate the agreements and to leave to various "trial tribunals" (with no consideration given to the traditional custom and established agreements) the determination of the question as to whether or not the work done by the individual employee or the employees of an individual plant did or did not constitute a part of the work week? That such was not the intention of the Congress is negatived by the fact that at the time of the enactment of the Act Congress is presumed to have had knowledge, and to have acted in conformity therewith, that all previous laws of similar purpose and import, all administrative rulings, and all judicial constructions had recognized and established the "face to face" basis of computing and paying wages in the underground iron ore mines and coal mines throughout the United States. The application of this past history and past administrative experience in the aid of the construction of the Act is and has always been recognized as the best aid for the construction of subsequent statutes of similar import or purpose.

Interstate Commerce Commission v. Baltimore and Ohio Railroad Company, 145 U. S. 263;

Reiche v. Smythe (1872), 13 Wallace, 162; 20 L. Ed. 566;

Mark v. United States, (1896), 161 U. S. 297; 17 S. Ct. 476; 40 L. Ed. 706;

U. S. v. Farrar, 281 U. S. 624;

Stairs v. Peaslee, (1855), 18 Howard (U. S.) 521; 15 L. Ed. 474;

National Lead Company v. United States, 252 U. S. 140;

United States v. Turner Turpentine Company, (C. C. A., 5th, 1940), 111 F. (2d) 400.

It is well settled that the practical construction of the parties and of those charged with the administration of the Act subsequent to its enactment should be considered in the construction of the Act. In the case of *Williams v. Jacksonville Terminal Company,* supra, the Court says:

> "While no findings as to its coverage appears in the records we are clear from the 1937 contract, *its practical application by the parties* and the new arrangements ultimately concluded, that the red caps were not within its terms."

See also *Chicago v. Shelton,* 9 Wallace 54.

This Court has recognized that the language used in the National Industrial Recovery Act and its construction in the administration of that Act should be accorded great weight in construing subsequent statutes.

In the case of United States v. Irwin (April 6, 1942), 62 Sup. Ct. 899, the Court had under consideration the question as to whether the construction of a library at Howard University, authorized by Congress in 1931, was a "public work" as that term was used in the Miller Act (enacted August 24, 1935), and which required the giving of prescribed bonds before a contract exceeding $2,000 in amount for the construction of any public work of the United States was awarded. The Supreme Court stated:

> "The question before us therefore is whether the construction of the library was a 'public work' as that term is used in the Miller Act. We think that it is, that the Assistant Secretary of the Interior was consequently authorized to require respondents to post a bond. * * *
>
> "No aid in ascertaining the meaning of 'public works'

is to be found in the Miller Act itself. But in the National Industrial Recovery Act, passed two years before the Miller Act Congress defined it as including 'any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public."

The Court, using the definition contained in an act relating to a similar subject matter, concluded that the library at Howard University fell within the terms of this definition and was, therefore, a "public work."

In the case of *Williams v. Jacksonville Terminal Company*, supra, the Court using it as an index to the intent of the Congress referred to the National Industrial Recovery Act and administrative practice thereunder and under other prior acts, using the following words:

". . . Under the NRA the inclusion of tips in wages on a plan similar to the accounting and guarantee plan, here involved, was proposed. In the approved codes tips were not expressly credited towards wages, but the relatively lower minimums for those customarily receiving tips may indicate that tips were given weight although not expressly mentioned. The federal social security laws define wages for old age benefits and social security taxes as 'all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash.' The regulations of the Social Security Board state, 'The following are excluded from the computation of "wages:" * * * Tips or gratuities paid directly to an employee by a customer of an employer, and not in any way accounted for by the employee to employer.' The Railroad Retirement Act § 1 (h), and the Railroad Unemployment Insurance Act § 1 (i), exclude tips from 'compensation' within the meaning of their provisions. The Railroad Retirement Board has determined that all earnings of the red caps, accounted for to the carriers under the plan here in question, are 'money remuneration' and therefore 'compensation' under the acts and not forbidden 'tips.' We can therefore examine the

Fair Labor Standards Act with the safe assumption that th word 'wages' has no fixed meaning either including or excluding gratuities." (In footnote 21 the Court cites various codes in support of the text).

In the case under consideration the NRA Code expressly provided for computation and payment of wages on the "face to face" basis with the approval of the President. (Page 18, supra).

THERE EXISTS A JUSTICIABLE CONTROVERSY BETWEEN PETITIONERS AND RESPONDENTS IN REFERENCE TO THE CONSTRUCTION OF SECTION 7 OF THE ACT FOR THE TIME SUBSEQUENT TO MAY 1, 1941

Petitioners were as much concerned with the conctructions of the law for the time after May 1, 1941, as for the time before.

The facts with reference to this are undisputed. They are not denied or even referred to in either the judgment of the District Court, or of the Circuit Court of Appeals.

While the claims for reimbursement, some three-fold more than the miners expected or contracted to receive, were and are important to petitioners, the declaration of the law as to the future is of at least equal importance.

The undisputed evidence shows that there existed an actual justiciable controversy between the petitioners and the underground employees, and between petitioners and the Administrator, not only as to prior, but more substantially as to future time—[This was the sole controversy with the Administrator, as set up in his answer.—(R. 301). As stated by him in evidence: "I intend to follow the interpretation in question, unless otherwise directed by the authoritative rulings of the courts or unless I shall sube-

quently decide that my prior interpretation is incorrect."—(R. 384)]—that, under the compulsion of the Administrator's opinion and employees' announced (and plead) intentions, petitioners changed to the "portal to portal" basis at great expense, cost, and loss of production. A judicial declaration was required and requested as to whether or not travel time was in and of itself a part of the "workweek."

This judicial inquiry the decision failed to answer, and confined its answer to the time prior to May 1, 1941. It predicated this answer on the employees' "reporting to the portal," there depositing "their identification check;" there "boarding the conveyance (provided by the company for transportation) coated with the grime of the mine" and riding in a "crouched position;" on the danger of "uninsulated wires," and because of instruction and supervision at the portal, etc.

Every one of these basic conditions can be eliminated at much less cost than compliance for all time with the judgment.

Declaratory judgment proceedings are most helpful in permitting parties to conduct themselves in the future with a minimum of damage on account of uncertainties as to their rights under statutes of uncertain meaning. The three recent nationwide coal strikes have failed of settlement largely because of the uncertainty as to whether or not the United Mine Workers of America and the coal operators, under the provisions of the Act, had the right to bargain collectively with respect to travel time.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals for the Fifth Circuit should be reversed and a judgment rendered herein declaring that it was not the intention of the Congress in the use of the word "workweek" as it appears in Section 7 of the Act in its application to petitioner's employees, to require "portal to portal" travel time to be included in the computation of the "workweek" prescribed by Section 7 of the Act.

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The undersigned, of counsel for Republic Steel Corporation, petitioner, hereby certifies that a printed copy of this brief has this day been served upon Crampton Harris and J. Q. Smith, Birmingham, Alabama, of counsel for respondents, and upon Bessie Margolin, Assistant Solicitor, United States Department of Labor, and the Solicitor General of the United States, Washington, D. C., this the ..... day of December, 1943.

BORDEN BURR.